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September 22, 1995

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N. W.
Washington, D. C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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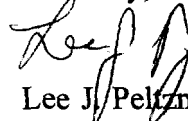
Re: Channel 49
Osage Beach, Missouri
Table of Allotments

Dear Mr. Caton:

Transmitted herewith, on behalf of Timothy D. Lischwe, are an original and 14 copies of his Application for Review of a Commission August 25, 1995, letter ruling.

Please contact the undersigned should questions arise regarding this filing.

Sincerely,



Lee J. Peltzman
Counsel for

TIMOTHY D. LISCHWE

Enclosure

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**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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SEP 25 1995

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

In the Matter of

Amendment of Section 73.606(b)
TV Table of Allotments
(Osage Beach, Missouri)

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MM DOCKET NO.
RM-

To: Chief, Allocations Branch
Policy & Rules Division
Mass Media Bureau

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APPLICATION FOR REVIEW

Timothy D. Lischwe ("Lischwe"), by his attorneys, pursuant to Section 1.115 of the Commission's rules, hereby seeks review of the letter ruling of the Chief, Policy and Rules Division, dated August 25, 1995, denying Lischwe's Petition for Reconsideration.

Lischwe had initially filed a petition for rule making requesting the allotment of UHF Channel 49 to Osage Beach, Missouri, as that community's first commercial television channel. His petition for rule making sought a waiver of the Commission's Freeze Order.^{1/} The August 25, 1995, letter ruling affirms a previous April 27, 1995, letter ruling returning Lischwe's petition for rule making and denying Lischwe's request for a waiver of the Commission's Freeze Order. As a review of the August 25, 1995, letter ruling reveals that it erred in failing to accept Lischwe's petition for rule making and granting Lischwe's requested waiver. The ruling was contrary to binding Commission precedent. Consequently, the matter requires Commission consideration as follows:

^{1/} See Advanced Television Systems, Mimeo. No. 4074, released July 17, 1987.

Question Presented for Review

Whether the Commission's August 25, 1995, ruling is in conflict with case precedent and established Commission policy.

Background

On January 31, 1995, Lischwe filed a petition for rule making requesting the allotment of UHF Channel 49 to Osage Beach, Missouri. Lischwe noted that his proposed allotment was subject to the Commission Freeze Order as Osage Beach is located within the required distance to both the St. Louis, Missouri, market as well as the Kansas City, Missouri, market. Lischwe, therefore, requested a waiver of the Commission freeze, pointing out that Channel 49 at Osage Beach would have no preclusive effect on possible St. Louis or Kansas City allotments, since the channel is already precluded by the existence of current channel allotments in both of those communities.

Lischwe cited a previous holding, Radnor Broadcasting Company, Inc., 4 FCC Rcd. 7815 (Mass Media Bur. 1989), in support of his position. In a April 27, 1995, ruling, the Chief, Allocations Branch, denied Lischwe's waiver request and found his rule making unacceptable for consideration without considering the Radnor Broadcasting case.

On reconsideration, the Commission, through its Audio Services Division, dismissed Lischwe's Petition for Reconsideration, distinguishing Radnor Broadcasting in one sentence by asserting that the case concerned an application whereas Lischwe's request was filed as part of a rule making petition. The August 25, 1995, ruling did not attempt to explain how that distinction was relevant to its decision.

Argument

It is by now hornbook law that, when rendering a decision, the Commission must clearly explain its reasons and "do more than enumerate factual differences, if any, between [the present case] and other cases; it must explain the relevance of those difference to the purposes of the Federal Communications Act." Melody Music, Inc. v. FCC, 345 F.2d 730, 733 (D.C. Cir. 1965).^{2/}

In attempting to distinguish the present circumstances from that which occurred in Radnor Broadcasting, the Audio Services Division has cited a distinction which is neither principled nor relevant. The fact that the Radnor Broadcasting waiver request was filed as part of an application while Lischwe's request deals with a rule making is no more a relevant distinction than the fact that Lischwe's request has to do with a Missouri station, whereas Radnor Broadcasting concerned a station located in Texas.

In attempting to distinguish prior cases, the Commission may not

run amok with a venerable common law method. Distinguishing cases on the basis of principled differentiations is one thing; consciously setting out to "confine each case to its own facts," another -- one which would virtually eliminate all precedent. After all, finding factual variations from case to case is a trivial task, and to say a case has been confined to its facts is just a polite way to say it has been ignored. But the Commission cannot be so cavalier with its own precedent and those of this court without suggesting that the rationale by which it is reaching its conclusions is either illogical or sub rosa, and thereby inviting reversal.

Communications Investments Corp. v. FCC, 641 F.2d 954, 976 (D.C. Cir. 1981).

^{2/} The Commission must explain "its decision with simplicity and clearness. . . We must know what a decision means before the duty becomes ours to say whether it is right or wrong." Secretary of Agriculture v. United States, 347 U.S. 645, 654 (1954).

In this case, Lischwe has acknowledged that the proposed allotment falls within the required distances to both the St. Louis and Kansas City, Missouri, markets. However, it is uncontested that neither market would be able to support an ATV operation on Channel 49 due to existing preclusion from other nearby markets. Operation on Channel 49 from the St. Louis market is already precluded due to the operation of Station WCFN(TV), a co-channel facility located in Springfield, Illinois. Similarly, operation on Channel 49 in the Kansas City market is precluded by Station KTKA(TV) a co-channel facility located at Topeka, Missouri. Thus, operation on Channel 49 in both St. Louis and Missouri is already precluded. Moreover, Lischwe demonstrated that his proposed allotment is located a greater distance from the St. Louis and Kansas City reference locations than the existing preclusive facilities.

The case at hand is directly on point with the relevant fact pattern which existed in Radnor Broadcasting Company. In that case, the Commission stated that

if a TV use of a channel in one of the designated cities in the list of 30 freeze markets is shown to be already significantly restricted by the proximity of another existing station and if the community of license of the proposed station is no closer to the listed city than is the existing station, we believe that sufficient basis exists to grant a waiver of the Freeze Order.

Radnor Broadcasting Company, *supra*.

Radnor Broadcasting Company was a decision of the Mass Media Bureau, which granted a waiver of the Freeze Order. That decision does not cite the fact that a waiver request was filed as part of an application as relevant in deciding the waiver request. The Mass Media Bureau does not operate as a republic with independent divisions, each making their own decisions in conflict with those of the Chief, Mass Media Bureau. As such, the August 25, 1995, ruling by the Policy and Rules Division was invalid as it conflicted with binding Commission and Bureau precedent.

Moreover, the courts have consistently recognized that the Commission's ability and willingness to waive its rules or policies in appropriate circumstances constitutes a necessary "safety valve." The integrity of the Commission's processes is particularly fortified where the Commission considers and grants a waiver to avoid the blanket application of a rule of policy in a situation in which the rule would lead to a result contrary to the Commission's overall policy.

As the court stated in WAIT Radio v. FCC, 418 F.2d 1153 (D.C. 1969):

The agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances. . . .

The Commission is charged with administration in the "public interest". That an agency may discharge its responsibilities which, in the overall prospective, establish the "public interest" for a broad range of situations, does not relieve it of an obligation to seek out the "public interest" in particular, individualized cases. . . .

The Bureau's action granting a waiver in Radnor Broadcasting Company constitutes a valid application of the Commission "safety valve" waiver procedure. Similarly, the Commission must give a "hard look" to Lischwe's request. In fact, waiver of the Commission's Freeze Order is warranted here to allow the Commission to better fulfill its overall statutory mandate of fostering the public interest.

Conclusion

The Radnor Broadcasting Company case is valid precedent. Moreover, that decision carries forward the Commission's policy of granting waivers under appropriate circumstances. The August 25, 1995, ruling is in conflict with Commission precedent and should be reversed. Accordingly, Lischwe requests that the Commission accept Lischwe's January 31, 1995, petition

for rule making, grant a waiver of its Freeze Order and allot Channel UHF Channel 49 to the community of Osage Beach, Missouri.

Respectfully submitted,

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